

No. 151

Office Supreme Court, U. S.

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CHARLES ELMORE CROPLEY  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES, INTERSTATE COMMERCE COM-  
MISSION, ET AL., APPELLANTS

v.

GREAT NORTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

STATEMENT AS TO JURISDICTION



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA,  
FOURTH DIVISION

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Civil No. 3586

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE  
COMMISSION ET AL., DEFENDANTS

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STATEMENT AS TO JURISDICTION

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In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, defendants-appellants United States of America and Interstate Commerce Commission submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on March 27, 1951.

OPINIONS BELOW

The report of the Interstate Commerce Commission is found in 275 I.C.C. 512. The opinion of the District Court for the District of Minnesota, Fourth Division, is reported in 96 F. Supp. 298. Copies of these documents are attached hereto.

## JURISDICTION

The judgment of the specially-constituted, three-judge district court, setting aside the order of the Interstate Commerce Commission, was entered on March 27, 1951. A petition for appeal is presented herewith on May , 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *United States v. U.S. Smelting Co.*, 339 U.S. 186; *Pennsylvania R. Co. v. United States*, 323 U.S. 588; *New England Divisions Case*, 261 U.S. 184.

## QUESTIONS PRESENTED

The Montana Western railroad is a short-line carrier which feeds into the Great Northern railroad, a trunk line. Most of the traffic carried by the Montana Western consists of grain raised in the area which it serves. Virtually all of the traffic is interstate in character. There is no alternate rail route between points on the Montana Western and points on the Great Northern.

Acting under authority of Section 15 of the Interstate Commerce Act, the Interstate Commerce Commission, finding it to be in the public interest, ordered the establishment of a joint rate for the interstate carriage of grain, in carloads, over the lines of the Montana Western and the Great Northern; it further prescribed a division of the joint rate between the two participating carriers.<sup>1</sup> The

<sup>1</sup> Other aspects of the Commission's order are not involved in this appeal.



joint rate ordered by the Commission was at the same level as the existing combination rate on the traffic.<sup>2</sup> The division prescribed, however, has the effect of giving an increased share of the revenue to the Montana Western. In making its order, the Commission gave weight to evidence that the Montana Western needed additional revenue in order to continue operating. The order of the Commission, insofar as it relates to the establishment of joint rates and divisions thereof, was set aside by the court below. The following questions are presented:

(1) Whether the Commission was authorized, in prescribing the joint rate and the division, to consider and give weight to the financial needs of one of the participating carriers;

(2) Whether the order of the Commission was arbitrary and capricious.<sup>3</sup>

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<sup>2</sup> A combination rate is the sum of the separately established rates of two or more carriers which hold themselves out to provide through carriage over their connecting facilities. *Great Northern R. Co. v. Sullivan*, 294 U.S. 458, 460; *Matter of Through Routes and Through Rates*, 12 I.C.C. 163. A joint rate, like a combination rate, is a rate for carriage over two or more lines which provide through service. It is a rate, however, which is established by agreement between the participating carriers (Interstate Commerce Act, Section 1(4)) or, in certain cases, by direction of the Commission (Section 15(1), (3), (4)). The division of a joint rate is determined by the terms of the agreement (see Section 1(4)) or by Commission order (Section 15(6)). See, generally, *St. Louis S.W. R. Co. v. United States*, 245 U.S. 136, 139 (footnote).

<sup>3</sup> The questions presented summarize the points raised in the Assignment of Errors, which are also presented.

## STATUTE INVOLVED

Pertinent portions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*, provide as follows:

Sec. 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railroads not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where

one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15 (6). Whenever, after full hearing upon complaint or upon its own initiative, the

Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.



## STATEMENT

The Montana Western is a short-line railroad whose entire line consists of some twenty miles of track between Valier, Montana, and Conrad, Montana, where it has a junction with appellee, the Great Northern, a trunk line operating in nine states. Almost all of the traffic handled by the Montana Western consists of freight moving in interstate commerce. Ninety-seven percent of the outbound tonnage carried by the line is agricultural produce, predominantly grain. Most of the farmers in the area served by the Montana Western (about 553 square miles) bring their produce to the railroad or to grain elevators located along its lines. The grain traffic has increased during the past ten years.

The average haul from the farm to the line for grain producers who use the Montana Western's facilities is 7.5 miles. If the line were abandoned, the average haul to the nearest railroad would be about 25 miles. There are highways in the area, but no common-carrier motor trucks or bus lines serve points on the Montana Western, except Conrad.

The Montana Western has been unprofitable for many years. The average annual deficit for the period 1933-1948 was \$18,762. Losses have been met by loans obtained from the Great Northern. The Great Northern is also the owner of Montana Western's outstanding bonds, all of which are in default. As of 1949, the total obligation of the Montana Western to the Great Northern amounted to \$737,604. In March of that year, Great North-



ern advised that it would make no further advances.

That advice by the Great Northern led the Montana Western to file an application for abandonment of its line. The Commission conducted hearings on the application in July 1949 (*Montana Western R. Co. Abandonment*, Finance Docket No. 16515) but, before final action was taken, the Valier Community Club, a voluntary organization of shippers and citizens, filed a complaint with the Commission against both of the carriers (*Valier Community Club v. Montana Western R. Co. and Great Northern R. Co.*, No. 30325). Valier's complaint sought the establishment of joint rates on grain moving, in carloads, from points on the Montana Western to points on the Great Northern, and a just division of the rates between the two carriers. The two cases were thereupon considered by the Commission on a common record.

The existing rates (the new rates ordered by the Commission have never gone into effect) on carloads of grain moving over the lines of the two carriers are combination rates. Joint rates are in effect on certain other commodities, which account for about 5 percent of the total tonnage.

The Commission found that it was "necessary and desirable in the public interest that joint through rates be established for the interstate transportation of grain, in carloads, from points on the Montana Western to points on the Great Northern, and that such rates may not exceed the present combination or proportional rates<sup>4</sup> to or

<sup>4</sup>The combination rate for Montana Western—Great Northern grain traffic is the sum of the proportional rates of the two carriers. A combination rate may consist of either

from Conrad." See Interstate Commerce Act, Section 15(3). Pursuant to Section 15(6), the Commission then prescribed a division of the joint rates. The formula which it adopted has the effect of increasing the Montana Western's share of the revenue obtained from the traffic. Thus, in the case of shipments from Valier to Minneapolis (most of the grain originating on the Montana Western moves to or through Minneapolis), the yield to the Montana Western is increased from 9¢ to 16.3¢ per cwt., that is, from 12.6 percent to 22.8 percent of the total through rate (71.5¢). Roughly comparable increases result on shipments originating on the Montana Western destined to other points on the Great Northern.<sup>5</sup>

In prescribing the division, the Commission gave consideration to various factors, among them, the rates which prevail on comparable runs. It found that the Great Northern's proportional rate<sup>6</sup> from Conrad to Minneapolis was substantially the same as the Great Northern's local rates on traffic from Pendroy, Montana, and Augusta, Montana, to Minneapolis. Pendroy and Augusta are located

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"locals" or "proportionals". *Western P. R. Co. v. Northwestern P. R. Co.*, 191 I.C.C. 127, 130. A local rate is the rate charged by a single carrier on traffic moving between two points on its own track. A proportional rate is a rate that one carrier charges for its share of a run which extends beyond its own lines; it is characteristically lower than the rate on local traffic moving over the same portion of that carrier's track.

<sup>5</sup> Granting the relief prayed by Valier, the Commission, of course, denied the application for abandonment (Finance Docket 16515). The district court's decree does not disturb that part of the Commission's order which relates to No. 16515, and it is not involved in this appeal.

<sup>6</sup> See Note 4, *supra*.

on the Great Northern's own lines and are in the same general area as is Conrad. The Commission concluded that its order in the instant case would give the Great Northern a car-mile yield on Conrad-Minneapolis traffic originating on the Montana Western which would be in substantial conformity with its car-mile earnings on Pendroy-Minneapolis and Augusta-Minneapolis traffic, "considering the proportional nature of the traffic from Conrad." The Commission also found that there is no indicated inefficiency of operation on the part of the Montana Western "except such as may have resulted from [its] inability \* \* \* to obtain sufficient revenue." It found further that the Montana Western needed added revenue in order to continue in operation and that its financial needs justified "the prescription of relatively higher divisional factors for the Montana Western than for the Great Northern." The Commission's report concludes that the scale of divisions adopted will afford the Montana Western a revenue increase estimated at \$58,000 per annum, and that such increase is necessary "to insure safe and efficient operation of that carrier's line and to pay interest on its indebtedness to the Great Northern."

The present action was brought in the United States District Court of Minnesota, Fourth Division, under 28 U.S.C. 1336, 1398, 2284, 2321-2325, to enjoin and set aside the order of the Commission. The court held that the Commission's order "is but a means to the end of assisting Montana Western to meet obvious financial needs" and that

"this is expressly prohibited" by the following language found in Section 15 (4):

No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The court also held that the Commission's order was not sustained by the evidence. It accordingly granted the relief prayed.

#### THE QUESTIONS ARE SUBSTANTIAL

1. The basic issue in this case is whether the Commission, in prescribing the joint rate and the division, went beyond its powers when it gave weight to the financial needs of one of the carriers involved. This Court has previously upheld the Commission's authority to consider the financial needs of a weak road and to give it a share of a joint rate larger than justice as between the parties would suggest, in order to maintain it in effective operation as part of an adequate public transportation system. *New England Divisions Case*, 261 U.S. 184; *United States v. Abilene & Southern R. Co.*, 265 U.S. 274. The limitation expressed in those cases, that the share left the strong road must be adequate to avoid a confiscatory result, is satisfied here; Great Northern makes no contention that its rate of return under the prescribed division is confiscatory. The principle of the district court's decision, if generally applied, would place a new limitation upon the Commission's authority to prescribe joint rates and divisions of



such rates, and would adversely affect it in its performance of its statutory duty; "developing, coordinating, and preserving a national transportation system."<sup>7</sup>

The issue turns on the proper construction of the three sub-paragraphs of Section 15 set out above. Appellants believe that the district court took the prohibitory sentence in section 15 (4) out of its proper context and erroneously applied it to a situation to which it was never intended to have application.

Section 15 (3) empowers the Commission to establish through routes, joint rates, and the division of such rates "wherever deemed by it necessary or desirable in the public interest." Section 15 (6) sets out the criteria which the Commission is to consider in prescribing "just, reasonable and equitable divisions" of joint rates. One of these is "the amount of revenue required [by the carriers] to pay their respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation."<sup>8</sup> Section 15 (4) is known as the short-haul provision.<sup>9</sup> It limits the power of the Commission to divert traffic to a new route where that would have the effect of compelling one of the participating carriers "to embrace in such route substan-

<sup>7</sup> See "National Transportation Policy", Transportation Act of 1940, c. 722, Title I, sec. 1, 54 Stat. 899.

<sup>8</sup> Another pertinent factor which the Commission is directed to consider is "whether any particular participating carrier is an originating, intermediate, or delivering line \* \* \*". See *Pacific & I. N. R. Co. v. Oregon Short Line Co.*, 185 I.C.C. 249, 262.

<sup>9</sup> See discussion in *Pennsylvania R. Co. v. United States*, 323 U.S. 588, 590-3.



tially less than the entire length of its railroad \* \* \* between the termini of such proposed through route." The entire thrust of this section, as more fully indicated in the discussion that follows, is that a carrier can only be compelled to short-haul itself (i.e. to embrace in a proposed route substantially less than its entire trackage between the termini) in certain stated circumstances.

If the sentence in section 15 (4) upon which the court below relied is read to prohibit the Commission from prescribing a joint rate and a division thereof which will assist one carrier to meet its financial needs, even where there is no question in the case of short-hauling another carrier, a direct conflict with Section 15 (6) is created. The latter section affirmatively directs the Commission to consider financial need. The purpose of section 15 (6) was fully stated by this Court in the *New England Divisions Case*, 261 U.S. 184, which involved a Commission order granting weak carriers east of the Hudson an increased share of existing joint class rates on traffic moving to and from the west. The Court held (pp. 189-191) that the object of the statute was to enable the Commission to divide joint rates in the public interest, assisting weak carriers, where necessary, to the end that the whole transportation system might be maintained. The Court further held (p. 195) that "the apportionment of a joint rate on the basis of the greater needs of particular carriers" presents no constitutional question in the absence of a claim that the division results in confiscatory rates. See also *United States v. Abilene & South-*

*ern R. Co.*, 265 U.S. 274, 284-5, and *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349.

There is neither need nor precedent for reading Section 15 (4) in such a way that it collides with the language and the purpose of Section 15 (6). Section 15 (4) has hitherto been deemed applicable only to cases involving short-hauling. See, e.g., *Pennsylvania R. Co. v. United States*, 323 U.S. 588, 590-3; *Interstate Commerce Commission v. Columbus & Greenville R. Co.*, 319 U.S. 551, 555; *United States v. Missouri Pacific R. Co.*, 278 U.S. 269. Indeed, until 1940, there was no language in Section 15 (4) susceptible of any broader interpretation.<sup>10</sup> The 1940 amendment was not designed to make Section 15 (4) applicable to new matters, but simply to redefine the circumstances in which the Commission could compel a carrier to short-haul itself. For many years, the Commission had been requesting the Congress to give it increased

<sup>10</sup> Prior to 1940, the section read as follows:

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." 41 Stat. 485-486.

authority in that respect. The 1940 amendment was a result of this effort. See testimony of Commissioner Eastman, *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 3400*, 76th Cong., 1st Sess., pp. 3-7, 211-213 (1939). Also, note the discussion of the statutory history in *Pennsylvania R. Co. v. United States*, *supra*, at pp. 591-2. New Section 15 (4) authorizes the Commission to short-haul a carrier (a) if the existing route is unreasonably long or (b) if the proposed route is needed in order "to provide adequate, and more efficient or more economic transportation." The section continues:

*Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The district court construed the last-quoted sentence as applicable to the present case. While the words are such that it is possible to give them application to situations which present no short-hauling problem, to do so is to ignore both the context in which they are found and the legislative history. A reading of the extensive hearings which led to the 1940 amendment of Section 15 (4) shows that the testimony was focused exclusively upon

the short-hauling problem.<sup>11</sup> Moreover, if the sentence in question had been intended to delineate the Commission's powers in situations other than those involving short-hauling, e.g., a case involving merely the power to prescribe a joint rate, it would have been logical to include a similar limitation in Section 15 (3), which was concurrently amended, and, also, to modify Section 15 (6), which directs the Commission to consider financial needs in prescribing divisions of joint rates. Neither of these things was done.

The only reasonable conclusion to be drawn is that Congress, in amending Section 15 (4), meant to deny the Commission the power to *divert traffic to a new route* where (1) the diversion would short-haul one of the carriers, and (2) the only economic justification was that another carrier would be financially assisted by the diversion. Here, there is no possible diversion of traffic, because there is only one rail route; no problem of short-hauling, because that problem arises only where there are alternate routes. To attribute force to the language of Section 15 (4) in the present circumstances would take that section beyond its intended meaning and bring it into irreconcilable conflict with the long-settled policy expressed in Section 15 (6): That the Commission shall consider the relative financial needs of the carriers in prescribing divisions of joint rates.

2. In addition to holding that the particular division ordered was "contrary to law", the dis-

<sup>11</sup> Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 3400, 76th Cong., 1st Sess. (1939); hearings before a Subcommittee of the Committee on Interstate Commerce on S. 1085, 76th Cong., 1st Sess. (1939).



district court declared that it was "not sustained by the evidence." It is plain, however, from the opinion that that view was premised entirely upon the court's conclusion that the abundant evidence pertaining to the financial needs of the Montana Western could not properly be considered.

The Commission acted in this case after extensive hearings and on the basis of a record of more than 1,000 pages. It heard evidence concerning the importance of the Montana Western's services, evidence relating to rate factors, and, as already indicated, evidence going to the financial necessities of the case. Assuming, as we believe one must, that the explicit language of Section 15 (6) governs and that the Commission was required to give consideration to evidence of financial need, the record furnishes a rational basis for the order. In such circumstances, it is well settled that the Court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547. The division of a joint rate, like the process of rate-making generally, is a matter peculiarly within the competence of the Commission. *Board of Trade v. United States*, 315 U.S. 534.

The Great Northern contended below that the Commission committed prejudicial error by going outside of the record and referring in its decision to a scale of rates derived in another case (the so-called Appendix 10 scale, promulgated in the *Class Rate Investigations*, 1939, 262 I.C.C. 447, 766). The district court did not rest its decision upon this contention or even refer to it in its opinion. Moreover, we submit that the Commission



used the Appendix 10 scale as a convenient formula for expressing the division it determined to be appropriate, rather than as evidence justifying the particular division ordered.

3. If the Commission should be deemed barred from considering financial need and from providing, in the exercise of its sound discretion, the kind of relief embraced by the order in this case, many weak short-lines, which serve an important public function, may be forced out of operation. Such a result would be entirely out of keeping with the intent of Congress, as reflected in Section 15 (6) (*New England Divisions Case, supra*) and in its declaration of a National Transportation Policy.<sup>12</sup> The powers of the Commission are believed equal to its "duty of being responsive to the dynamic character of transportation problems." *Board of Trade v. United States, supra*, at p. 546.

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<sup>12</sup> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Transportation Act of 1940, c. 722, Title I, Section 1, 54 Stat. 899.

It is submitted that the district court's reading of the statute and its action in setting aside the order of the Commission raise substantial questions of general importance.

Respectfully submitted,

PHILIP B. PERLMAN,

*Solicitor General.*

DANIEL W. KNOWLTON,

*Chief Counsel, Interstate Commerce  
Commission.*

## APPENDIX

## INTERSTATE COMMERCE COMMISSION

Finance Docket No. 16515<sup>13</sup>

## MONTANA WESTERN RAILWAY COMPANY ABANDONMENT

Submitted June 7, 1950. Decided July 31, 1950

1. Public convenience and necessity found not to permit abandonment of the line of The Montana Western Railway Company, insofar as interstate and foreign commerce is concerned. Application denied.

2. Joint rates for the interstate transportation of grain, in carloads, from points on the Montana Western Railway to points on the Great Northern Railway found to be necessary and desirable in the public interest. Reasonable joint rates and just, reasonable, and equitable divisions of such rates prescribed.

*Art Jardine* for Montana Western Railway Company.

*Louis E. Popplar, Edwin S. Booth, Horace F. Casey, M. C. Johnson, Roscoe C. Lots, H. W. Ansell, J. P. Seifert, and Ralph C. Bricker* for protestants.

*Lester H. Loble* for complainant in No. 30325 and for protestants in Finance Docket No. 16515.

*R. J. Hagman* for Great Northern Railway Company.

<sup>13</sup> This report embraces also No. 30325, Valier Community Club v. Montana Western Railway Company et al.

## REPORT OF THE COMMISSION

## BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the applicant in Finance Docket No. 16515 and by The Montana Western Railway Company and the Great Northern Railway Company, defendants in No. 30325, and the Valier Community Club; the State of Montana, and the Board of Railroad Commissioners of the State of Montana replied thereto. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in the findings or conclusions have been given consideration and found not justified.

By application filed March 29, 1949, The Montana Western Railway Company, hereinafter called the applicant, applied for a certificate of public convenience and necessity authorizing the abandonment of its entire line of railway extending between Valier, Mont., and the junction point with the line of the Great Northern Railway Company. The junction point is about 2.98 miles from the station of the Great Northern at Conrad, Mont. The application was amended at the hearing to cover operations by the applicant over the tracks of the Great Northern. The entire length of the applicant's line, including the operation over tracks of the Great Northern, is about 20 miles.

By complaint in No. 30325 filed August 1, 1949, as amended at the hearing in December 1949, the Valier Community Club, a voluntary organization of citizens, seeks the establishment of reasonable joint rates on grain, in carloads, from points on the Montana Western to points on the Great Northern

and the establishment of just, reasonable, and equitable divisions of such rates.<sup>14</sup>

The Great Northern is not a party to the abandonment application, but when the complaint in No. 30325 was filed, the Commission by order of October 13, 1949, reopened Finance Docket No. 16515 for further hearing and disposition upon a common record with No. 30325, with the proviso that witnesses previously heard in the abandonment application should be made available for cross-examination by the Great Northern.

The Board of Railroad Commissioners of the State of Montana filed a motion in the abandonment proceeding objecting to the jurisdiction of this Commission and moving to dismiss the application, upon the grounds that the provisions of section 1 (18) and (20) of the Interstate Commerce Act do not extend to abandonment of an entire railroad system wholly owned and operated within a single State. This motion is based primarily upon the decision of the United States Supreme Court in *Texas v. Eastern Texas R. Co.*, 258 U. S. 204. In that case the railroad sought to be abandoned operated entirely within the State of Texas. Approximately three-fourths of its traffic was interstate and foreign commerce and the remainder was intrastate. The Court held that paragraphs (18), (19), and (20) of section 1 of the Interstate Commerce Act "should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business." The applicant has filed with the Board of Railroad Commissioners of the State of Montana an application which is substantially similar to

<sup>14</sup> Rates and divisions of rates will be stated in cents per 100 pounds, except as otherwise noted.



that filed with us. The motion to dismiss for want of jurisdiction is overruled. Following our practice in such proceedings, any certificate which might be issued in a proceeding of this nature would be limited to operations in interstate and foreign commerce.

Applicant was incorporated under the laws of the State of Montana in 1909. The line was originally constructed in that year from Conrad to Valier, a distance of about 20 miles. In 1928 that portion of the line paralleling the tracks of the Great Northern near Conrad was abandoned and a junction with the Great Northern was constructed north of the station in Conrad. A trackage agreement was entered into with the Great Northern whereby the applicant was permitted to operate over the tracks of the Great Northern for a distance of 2.98 miles. Valier has a population of about 800 and Conrad about 2,000. There are two nonagency stations on applicant's line, Manson 7 miles from Conrad, and Williams 14 miles from Conrad. There is a small station building at both Manson and Williams but no other station facilities. The population of Manson is estimated as 10 and Williams as 11. However, there are two grain elevators at Williams and an elevator devoted entirely to the storage of mustard seed at Manson. The approximate area served by the applicant's line, exclusive of Conrad, is about 553 square miles, and the population served is about 2,000.

The train service consists of a mixed train which makes a round trip daily, except Sundays. The traffic handled consists of passengers, mail, and less-than-carload and carload freight. Express is handled as freight.

The possibility of operating applicant's line on a part-time basis and for freight service only has been under consideration for a long time. It was suggested that operation over the tracks of the

Great Northern be discontinued by the construction at the junction point of an interchange track and a wye for turning the locomotive. The cars would then be picked up by the Great Northern at that point. The estimated cost of this construction is \$6,281 for the interchange track and \$1,374 for the wye, a total of \$7,655. It would be impossible, however, under present conditions for the applicant to obtain operating crews on a part-time basis. The loss of the mail contract would mean a loss in revenue of approximately \$2,900 per annum.

The Great Northern and a land irrigation company jointly furnished the money to construct the applicant's line. The Great Northern purchased the bonds and the irrigation company subscribed to the stock of the applicant. The Great Northern's agricultural agents were active in the years 1910 to 1917 in advertising and bringing settlers to the Valier irrigation project. The advertising literature distributed by the Great Northern stressed the fact that the Valier irrigation project was served by a railroad.

The applicant's bonded indebtedness is \$165,000, the entire amount of which is owned by the Great Northern. These bonds, dated January 1, 1912, bear interest at the rate of 6 percent. The maturity date has been twice extended and is now September 1, 1947. No interest has ever been paid on these bonds, and the amount of the principal has never been reduced.

In addition to the bonded indebtedness and unpaid interest, the applicant owes the Great Northern, as of March 31, 1949, \$195,829 for materials and supplies, repairs, labor, and money advanced to cover operating expenses. The total indebtedness of the applicant to the Great Northern, at the time of the first hearing in July 1949, was \$737,604. Since 1924, the applicant's operating losses have been paid by advances from the Great Northern.

The stock of the applicant consists of 2,000 shares, par value \$100 each. The Valier Company owns 1,995 shares, and the other 5 are directors' qualifying shares. In the early part of 1949, after the Great Northern had refused to make further advances to the applicant, the Valier Company advanced \$1,800 to the applicant for operating expenses.

The Valier Company is the successor in interest of three prior companies, the Conrad Land & Water Company, Valier Montana Land & Water Company, and The Valier Montana Land & Water Company. The first of these companies started the construction of the Valier irrigation project and subscribed to the stock of the applicant railroad. The Valier Company now owns 26,000 acres of land in the vicinity of Valier, which is all leased to farmers. On January 10, 1950, since the last hearing in this proceeding, the Supreme Court of the State of Montana, in an action for a declaratory judgment brought by the Valier Company against the Carey Land Board for the State of Montana, directed sales to actual settlers, in areas not greater than 160 acres to any one person, of certain lands which the predecessors of the Valier Company acquired by foreclosure or by deeds given by defaulting settlers in lieu of foreclosures. *Valier Co. v. State*, 215 P. (2d) 966. It is anticipated that this decision will be appealed to the United States Supreme Court.

As of March 26, 1949, the Cargill Securities Company was the owner of 3,859 shares, or about 60 percent, of the capital stock of the Valier Company. The Cargill interests are among the largest grain dealers in the country.

Applicant's line was not built according to accepted standards of economical maintenance. Untreated cross ties were laid on the ground with practically no ballast. As a result, drainage is almost nil on the greater portion of the line, and

the cross ties deteriorate rapidly. Normally, from 4,000 to 7,000 cross ties are replaced each year. At the first hearing, applicant's superintendent testified that about 5,000 new cross ties were needed for replacement within the next year, and at the second hearing he testified that it was necessary to replace about 8,850 cross ties in 1950 for safe operation. All structures are in good condition, except the pile bridge over the dry fork Marias, which was damaged in the flood of 1948. The cost of repairs to this bridge for safe operation was estimated at \$5,000 at the first hearing and \$5,500 at the second hearing. The weight of the rails is 58 and 60 pounds per yard. The roundhouse will probably have to be replaced in 1952, at a cost of about \$7,000.

Applicant's rolling stock consists of one gaso-line-electric locomotive, with a 600-volt, 125-horsepower engine, weighing 72,000 pounds; one steam locomotive, with three sets of drivers, weighing 54 tons; and one flatcar.

The average number of employees in 1933 was 13 and in 1948, 13.3. The total compensation of all employees in 1933 was \$12,593 and in 1948, \$40,174, an increase of 311 percent. Applicant's employees are paid the same rate of pay per day as employees of the Great Northern. They are not, however, covered by the same working rules. They enjoy the benefits of the Railroad Retirement Act. Their seniority applies only on the line of the applicant.

There are no common-carrier motortrucks or motorbus lines serving stations on the applicant's line, except Conrad. There are motortruck and motorbus services daily on Federal Highway No. 91 running north and south through Conrad. An oil-surfaced highway runs between Valier and Highway No. 91. The highway distance between Conrad and Valier is 23 miles. A graveled highway runs southwest from Valier, connecting with U.S. Highway No. 89.



As indicated, over a period of more than 25 years the Great Northern has made advances to the applicant to cover its operating losses. By letter dated November 21, 1923, the vice president of the Great Northern advised the secretary of the applicant as follows: "In a general way I can say we expect to see that the Montana Western is taken care of to the extent it is unable to take care of itself." A similar letter from the Great Northern was addressed to the secretary of the applicant under date of December 20, 1937. In August 1947, the vice president and general counsel of the Great Northern wrote to the applicant suggesting a 10-year extension of the mortgage bonds from September 1, 1947, to September 1, 1957. Following this, the Great Northern's engineers, in the fall of 1947, made an inspection of the applicant's line and formulated an 8-year rehabilitation program involving an expenditure of \$171,000. In due course, the Great Northern advanced to the applicant sufficient money to accomplish a portion of the program allocated during the year 1948. However, the completion of the 1948 portion of the program was prevented by a flood. The portion of the program allotted to 1948 involved an expenditure of \$27,295, of which \$17,000 was spent in that year. On July 28, 1948, the Great Northern again requested the officers of the applicant to extend the mortgage bonds. The applicant's officers declined to extend the bonds on the ground that there was no hope of paying the indebtedness. They suggested that the Great Northern take over the properties of the applicant, and offered to execute a deed in lieu of foreclosure. On December 18, 1948, the Great Northern advised the officers of the applicant as follows: "A continuation of the rehabilitation program on the Montana Western is of no particular advantage to the Great Northern. In view of the Montana Western's attitude, as outlined in

your letter, the Great Northern cannot be expected to advance any further cash or materials to the Montana Western in furtherance of its rehabilitation program." By letter of March 1, 1949, the Great Northern again advised that no further advances of funds or materials and supplies would be made to the applicant.

Generally, about 96 percent of the total freight traffic of the applicant is interstate. During the past 5 years, 91 percent of the total tonnage carried by the applicant and 97 percent of the outbound tonnage has consisted of products of agriculture. The agricultural products carried consist principally of wheat, oats, barley, and mustard seed. In 1946 and 1947, 96 percent of the total tonnage consisted of grain. There is also a small tonnage of sugar beets. The applicant carried 883 carloads and 760 tons of less-than-carload freight in 1947, and 540 carloads and 663 tons in 1948. Most of the grain moves to Minneapolis and Duluth, Minn.

During the 16 years 1933 to 1948, both inclusive, the applicant's tonnage of products of agriculture averaged 27,662. The average number of tons of grain carried in the 15 years 1934 to 1948 was 23,586, and in the years 1939 to 1948, 25,774. The grain traffic over the years has not declined; on the contrary, during the last 10 years it has increased. The tonnage of grain carried in 1947 was 39,079. Assuming a weight of 50 tons per car, this amounted to 781 carloads.

Abandonment of the applicant's line would mean that grain producers in the areas served by the applicant would have to haul their grain about 25 miles to a railroad, instead of an average haul now of 7.5 miles to a point on the applicant's line. Whether or not grain elevators now located on the applicant's line would be abandoned if the line were abandoned, is uncertain, except as will appear later. Storage elevators or other local storage

facilities for grain are approved by the Government loaning authorities. The transportation charges from the point of storage must be paid by the Commodity Credit Corporation if the loan is not redeemed. If the grain is sold on the open market, the transportation charges are paid by either the buyer or the seller. Under present conditions, most of the grain is put in storage under the Government loan plan, and becomes the property of the Commodity Credit Corporation when the loan is not redeemed. During 1948 and 1949, the elevators on the applicant's line and at Conrad and other points in this general territory were filled to capacity. Farmers have therefore been urged to provide their own storage space, and the Government allows 7 cents a bushel per year for a storage charge on grain which is under loan. No Government allowance for the storage of barley under loan was made in 1948, but in 1949 an allowance of 10 cents was made for storage of wheat or barley. It costs about 15 cents a bushel to provide facilities for grain storage in this territory.

Grain from the territory served by the applicant is also hauled to Cut Bank, Shelby, and Pendroy, Mont., points on the Great Northern, and to Agawam, Mont., on the line of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called the Milwaukee. During 1949, when elevator storage space on the applicant's line was mostly filled, grain producers in this area were forced to truck their grain to such points, whereas ordinarily they would have hauled such grain to Valier or Williams on the applicant's line.

Shelby is an inspection point for grain. There are elevator facilities at that point and transit arrangements are in effect. The destinations to which grain originating at Valier or Williams is shipped can best be ascertained by an examination of the points to which grain is reconsigned after

inspection at Shelby. The months of heaviest grain movement from Valier to Shelby during 1946, 1947, 1948, and the first 9 months of 1949 were selected for study. This study shows that 61.8 percent of the carloads of grain from Valier, re-consigned from Shelby, moved to eastern terminals, Minneapolis, Duluth, Grand Forks, N. Dak., and other points taking the same rates, as defined in Great Northern Railway tariff I. C. C. No. A-8352; 29 percent moved to north coast terminals, Seattle and Tacoma, Wash., Portland, Oreg., and other points taking the same rates, as defined in Agent W. J. Bohon's tariff I. C. C. No. 798; and 9.2 percent moved to Spokane, Wash.

Most of the farmers in the area served by the applicant ship their cattle by truck either to Great Falls, Mont., or to Shelby. A few carloads of sheep are handled annually. In the years 1938 to and including 1941, an average of 282 carloads of sugar beets were shipped out over the applicant's line. In 1946 and 1947 no sugar beets were handled, and in 1948 only 14 carloads were shipped. Sugar beets from Valier and Conrad moved to a refinery at Chinook, Mont. The distance from Valier to Chinook via Conrad and Shelby is about 157 miles. The applicable rate is a combination, composed of 51 cents per ton from Valier to Conrad and \$1.27 per ton from Conrad to Chinook. The ratio of the rate from Valier to Conrad to the through combination rate is 28.6 percent.

Valier is served by a natural gas pipeline, and natural gas is generally used for heating purposes. This has reduced the tonnage of coal on the applicant's line.

The net railway operating incomes or deficits of the applicant are shown below for the years 1944 to 1948, and for the first 10 months of 1949:

1944	1945	1946	1947	1948	Jan 1 to Oct. 31, 1949
\$833	\$16,728	\$5,466	\$14,670	\$27,107	\$2,904
Deficit.					



It will be noted that in 1944 and in the first 10 months of 1949 the applicant operated at a profit, not including interest on its indebtedness. The average annual deficit in net income for the years 1933 to 1948 was \$18,672. The applicant's cash balance on October 31, 1949, was \$29,417.

The traffic carried by the applicant was subnormal in 1948 by reason of the fact that the grain was held in the elevators generally under the Government loan plan and was not moved out during the year. In 1949, however, more than the usual number of carloads of grain moved out over applicant's line. The heavy movement began in August after the car shortage in June and July. In August, September, October, and November, 1949, it reached a total of 518 carloads.

The area served by the line produces from 800,000 to 1,000,000 bushels of grain annually. The wheat produced has a high protein content. Crop failures are rare since a part of the grain is raised on irrigated land.

There are six grain elevators on the applicant's line, and one elevator at Manson which is devoted to the storage of mustard seed. At the time of the first hearing there were seven grain elevators, but the Farmers' Union Elevator at Valier was totally destroyed by fire. Cargill, Incorporated, owns two grain elevators in Valier, and it was stated on their behalf that these two elevators would be continued in operation in the event the applicant's line is abandoned. There are two other grain elevators in Valier, one with a capacity of 40,000 bushels and the other with a capacity of 85,000 bushels. Additionally, two grain elevators are at Williams, with a total capacity of 80,000 bushels. It is doubtful whether the four elevators last mentioned would continue to operate if applicant's line were abandoned and this is also true of the elevator at Manson.

There is a bulk oil storage plant at Williams, but most of the oil stored in this plant is now brought in by motortruck. Normally, it moves by tank trucks of 5,000 gallons' capacity.

Revenue from passenger operations was \$414 in 1947 and \$259 in 1948. The saving in operating expenses from the discontinuance of passenger service would be very slight, as a passenger car or caboose is needed for the trainmen.

The key grade is 3 percent. It occurs about a mile out of Valier and is against the out-bound movement. This grade limits the capacity of the steam locomotive out of Valier to eight carloads and the gasoline-electric locomotive to two carloads of grain. The steam locomotive can pick up two more cars and the gasoline-electric locomotive one more car at Williams for movement to Conrad.

In 1928, the assessed valuation of applicant's property for State and county tax purposes was \$180,095, and in 1949, \$117,100. The assessed value of all real and personal property in Valier in 1939 was \$569,090, and in 1948, \$1,002,239. The applicant's State and county taxes for 1949 amounted to \$4,400, and have not been paid. Likewise, one-half of the 1948 taxes, \$1,900, has not been paid. State and county authorities are here before us opposing the application. A reconsideration of applicant's assessed valuation, so as to ease the tax burden on this road, would be appropriate.

Applicant obtains its freight cars from the Great Northern under a per diem arrangement. On November 1, 1949, the per diem charge for freight cars became \$1.75 per car. The arrangement between the applicant and the Great Northern is substantially as follows: (1) On an empty car delivered by the Great Northern to the Montana Western, the per diem charge commences only from the time the Montana Western spots the car for loading and terminates with delivery of the car to the Great Northern, which period is adjusted

to allow the Montana Western 2 days' free time as a maximum; (2) on a car delivered by the Great Northern to the Montana Western under load, the per diem commences from the time of delivery of the car to the Montana Western and continues until it is unloaded. There is no charge during the period the Montana Western holds the car for prospective loading. Per diem commences again when the Montana Western places the car for loading and continues until the loaded car is delivered to the Great Northern, subject to a maximum of 2 days' free time on each of the loaded movements.

The rates on grain from points on the applicant's line have always been proportional rates based on Conrad. There are no joint through rates on grain. The present proportional rate from points on the line to Conrad resulted from an agreement made in 1924 after an investigation by the Board of Railroad Commissioners of the State of Montana.

Joint through rates are in effect between points on the applicant's line and points on the Great Northern on many commodities. However, only about 5 percent of the carload tonnage carried by the applicant moves on joint through rates with the Great Northern.

The proportional rates on grain are 9 cents from Valier to Conrad, 20 miles, and 8.5 cents from Williams to Conrad, 14 miles. The proportional rate from Conrad to Minneapolis and points taking the same rate is 62.5 cents, making a combination of 71.5 cents from Valier and 71 cents from Williams. The proportional rate from Conrad to Seattle, Wash., and points taking the same rate is 58.5 cents, making a combination of 67.5 cents from Valier and 67 cents from Williams. The proportional rate from Conrad to Spokane, Wash., is 56 cents, making a combination of 65 cents from Valier and 64.5 cents from Williams. The local rates from Conrad are higher than the propor-

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tional rates by 3 cents to Minneapolis, 2.5 cents to Seattle, and 3.5 cents to Spokane. The complainant in No. 30325 seeks the establishment of joint rates the same as the through combination rates in effect, and just, reasonable, and equitable divisions of such rates, to points on the Great Northern.

The general basis of divisions of joint rates of the applicant with the Great Northern is 12.5 percent of the through rate or of the proportion of the through rate accruing west of the Great Northern's eastern terminals of Omaha, Nebr., and Kansas City, Mo. These divisions apply to all freight, except as otherwise provided. There are some specific divisions in stated amounts on commodities such as coal, cement, and plaster. The 12.5 percent basis applies on livestock, subject to a maximum proportion in 1949 of \$15.75 per car. This maximum would now be \$23.47. On lumber from Montana, Washington, Idaho, Oregon, and British Columbia, Canada, to Valier, the specific division in 1939 was 6.3 cents. From points in Wyoming to Valier the specific division of joint rates on petroleum products in 1939 was 6.5 cents. Because of the maximum increases authorized on and after June 20, 1946, and the method provided for increasing divisions where such divisions were a fixed amount, the present divisions on lumber and petroleum products cannot be determined upon the record. The rates to which these specific divisions in stated amounts apply are not shown.

Pendroy is at the end of a branch line of the Great Northern, 51 miles from the junction at Power, Mont., and 1,095 miles from Minneapolis. In 1948, the out-bound movement from this branch consisted of 801 carloads. Augusta, Mont., is at the end of a branch line of the Great Northern connecting with the main line at Vaughn, Mont., a distance of 42 miles. The out-bound movement from this branch in 1948 was 502 cars. Power and



Vaughn are 42 and 56 miles, respectively, north of Conrad on the Great Falls-Shelby line of the Great Northern. Agawam is at the end of a branch line of the Milwaukee, 66 miles from Great Falls. In 1948, the out-bound movement from this branch was 127 carloads. The applicant's line produced substantially more traffic per mile of road than the Pendroy branch or the Augusta branch of the Great Northern, or the Agawam branch of the Milwaukee. The grain rates from Pendroy, Augusta, and Agawam are substantially the same as the rates from Conrad, there being 0.5 cent difference from Agawam to Minneapolis and 0.5 cent difference from Pendroy, Augusta, and Agawam to Spokane. The grain rates from and to these points are shown below:

From—	To Minneapolis, Minn.	To Seattle, Wash.	To Spokane, Wash.
	Cents	Cents	Cents
Pendroy, Mont. ....	65.5	61	61
Augusta, Mont. ....	65.5	61	61
Agawam, Mont. ....	66	61	61
	65.5	61	59.5
Conrad, Mont. ....	62.5	58.5	56

<sup>1</sup> Applies only as a proportional rate on traffic originating on the Montana Western.

The rate on grain from Great Falls to Minneapolis is 65.5 cents, the same as the rate from Conrad, Pendroy, and Augusta, the rate from Agawam being 0.5 cent higher. The rate on grain from Great Falls to Seattle is 61 cents, the same as from Pendroy, Augusta, Agawam, and Conrad.

The Great Northern compared the proportional rates of the Montana Western on grain with divisions of joint rates on grain and lumber received by various other connecting short lines. These divisions range from 3.9 cents to The Waterville Railway Company for a haul of 5 miles to the junction at Douglas, Wash., on movements to North Pacific coast, Montana, and transcontinental destinations, to 7.8 cents to the Cowlitz, Chehalis & Cascade Railway for a haul of 15 miles to the junction at Chehalis, Wash., on shipments to transcontinental destinations. It does not appear that the conditions

encountered on any of these short lines are similar to those on the Montana Western.

As indicated by the comparisons made, the rates from Pendroy and Augusta are lower for somewhat longer hauls than the rates from Williams and Valier, respectively, by 5.5 and 6 cents to Minneapolis, 6 and 6.5 cents to Seattle, and 3 and 4.5 cents to Spokane. These differences in rate level have their source in the relatively high proportional rates from Conrad, as will appear later in this report.

Section 15 (6) of the Interstate Commerce Act provides that in determining divisions the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

There is no indicated inefficiency of operation, except such as may have resulted from the inability of the Montana Western to obtain sufficient revenue.

In the consideration of the amount of revenue required by the Montana Western, there is justification for the prescription of relatively higher divisional factors for the Montana Western than for the Great Northern. Substantial differences in the divisional factors, 35 percent greater for southwestern lines than for northern lines, for use in the division of joint rates between official and southwestern territories, 25 percent greater

for southern lines than for northern lines, for use in the division of joint rates between official and southern territories, and 10 percent greater for lines in western trunk-line zones other than zone I than for lines in the latter zone and in official territory, for use in the division of joint rates between official territory and western trunk-line zone I on the one hand, and the remainder of western trunk-line territory on the other, were prescribed, respectively, in *Southwestern Official Divisions*, 234 I. C. C. 135; *Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175; and *Official Western Trunk Line Divisions*, 269 I. C. C. 765. Factors 66.7 percent greater for southern lines than for northern lines were prescribed in *Divisions of Rates, Official and Southern Territories*, 278 I. C. C. 89, decided May 4, 1950, for use in the division of joint proportional rates on grain from East St. Louis, Ill., Louisville, Ky., and Cincinnati, Ohio, to southeastern destinations. The fact that on some of the grain the northern lines receive in-bound hauls to the points from which the proportional rates apply was a consideration, as was also the fact that the northern lines serve principally as intermediate carriers. In the instant proceeding, much of the grain from Montana Western origins to Minneapolis and Duluth receives additional hauls beyond those points, as to which the Great Northern is mostly an intermediate carrier.

We are of the opinion that the appendix 10 scale of first-class rates set out in *Class Rate Investigation*, 1939, 262 I. C. C. 447, 766, increased 20 percent for the hauls over the Montana Western, are appropriate factors for the division of joint rates on grain from Montana Western origins to Great Northern destinations, except that in the division of rates to Minneapolis and Duluth, factors for the Great Northern 10 percent below the scale are warranted because in many instances its services

are those of an intermediate carrier and in some instances it receives additional revenue on the traffic beyond those two points.

The use of the appendix 10 scale, increased 20 percent for the Montana Western hauls, and decreased 10 percent for the hauls over the Great Northern to Minneapolis, would result in divisional factors as follows:

From—	To—	Distance Miles	Appendix 10 scale Cents	Factors
Valier, Mont. ....	Conrad, Mont. ....	20	48	58
Williams, Mont. ....	do. ....	15	46	55
Conrad, Mont. ....	Minneapolis, Minn. ....	1,030	221	199
Do. ....	Spokane, Wash. ....	457	134	134
Do. ....	Seattle, Wash. ....	738	185	185

The use of such factors in the division of joint rates the same as the combination rates now in effect would result in divisions as follows:

From—	To—	Rates Cents	Factors (1)	Percent (2)	Divisions (1)	(2)
Valier, Mont. ....	Minneapolis, Minn. ....	71.5	58	199	23	77
Williams, Mont. ....	do. ....	71	55	199	22	78
Do. ....	Spokane, Wash. ....	64.5	55	134	29	71
Valier, Mont. ....	Seattle, Wash. ....	67.5	58	185	24	76
Montana Western.						
Great Northern.						

The relatively high level of the proportional rates of the Great Northern from Conrad is indicated in the relation to the appendix 10 scale. The proportional rates of 62.5 cents from Conrad to Minneapolis, 1,030 miles, is 28.3 percent of the scale rate of 221 cents, and the rate of 9 cents from Valier to Conrad, 20 miles, is 18.7 percent of the scale rate of 48 cents. The maintenance of relatively higher proportional rates by the Great Northern than by the Montana Western has no support upon this record.

The first-class rates of the Montana Western, which are used by the Great Northern as prorating factors in an endeavor to show the reasonableness of the proportional rates, also are upon a lower level, distance considered, than the first-class rates of the Great Northern. For example,



the first-class rate from Valier to Conrad, 53 cents, is 110.4 percent of the appendix 10 scale rate of 48 cents, and the first-class rate of 512 cents from Conrad to Minneapolis is 231.7 percent of the appendix 10 scale rate of 221 cents. Rates of the Montana Western which are relatively lower than those of the Great Northern, distance considered, afford no basis for the computation of a rate prorated in the determination of equitable divisions.

An average increase of about 7.3 cents in the proportion to the Montana Western on grain to Minneapolis on 450 carloads, the approximate movement in 1947, would result in an increase in the annual revenue to that road of about \$32,850. The total annual revenue increase to that road which would result under the divisional factors indicated is estimated, roughly, at about \$58,000. The increased revenues for the Montana Western under the divisions herein prescribed are needed to insure safe and efficient operation of that carrier's line and to pay interest on its indebtedness to the Great Northern.

The proportional rate of 62.5 cents from Conrad to Minneapolis yields to the Great Northern 60.7 cents per car-mile. A division to that road of 55 cents out of the rate from Valier to Minneapolis, for example, under the foregoing divisional factors, would yield 53.4 cents a car-mile. Considering the proportional nature of this traffic from Conrad, such earnings compare favorably with car-mile yields of 59.8 cents under the rate from Pendroy and 61.2 cents under the rate from Augusta to Minneapolis.

We find that public convenience and necessity do not permit the abandonment of the line of the Montana Western insofar as interstate and foreign commerce is concerned. The application in Finance Docket No. 16515 will be denied.

We further find that it is necessary and desirable in the public interest that joint through rates be established for the interstate transportation of grain, in carloads, from points on the Montana Western to points on the Great Northern, and that such rates may not exceed the present combination of proportional rates to and from Conrad.

We further find that just, reasonable, and equitable divisions of such joint rates are determined by the use as divisional factors of the distance rates set forth in appendix 10 of *Class Rate Investigation, 1939, supra*, for the respective hauls of the two roads, provided that the divisional factors thus determined for the Montana Western shall be increased 20 percent, and provided further, that on grain to Minneapolis and Duluth, and points beyond, the divisional factors thus determined for the Great Northern shall be decreased 10 percent. Fractions in the percentages shall be dropped when less than 0.5, increased to the next integer when over 0.5, and when equal an additional integer shall be added to the smaller of the percentages; fractions in divisional factors shall be dropped when less than 0.5 and increased to the next integer when 0.5 or over; and fractions in the resulting divisions shall be resolved to the nearest half cent.

An appropriate order will be entered.

COMMISSIONERS ALLDREDGE and MITCHELL, being necessarily absent, did not participate in the disposition of this proceeding.

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UNITED STATES DISTRICT COURT, DISTRICT OF  
MINNESOTA, FOURTH DIVISION

No. 3586 Civil

GREAT NORTHERN RAILWAY COMPANY, a Corpora-  
tion, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Defendant*

PER CURIAM

The Great Northern Railway Company brings this action to set aside the order of the Interstate Commerce Commission dated July 31, 1950, and asking that said Commission be enjoined and restrained from enforcing the same.

In due course answers were made and filed by defendant and Montana Western Railway Company (hereinafter referred to as Montana Western), Board of Railroad Commissioners of the State of Montana, and the Valier Community Club. The cause came on for hearing before a statutory three-judge Court, in the United States Court House, at Minneapolis, Minnesota, on February 20, 1951.

The order of the Commission arises out of two proceedings before it, the first being Finance Docket 16515, entitled, In the Matter of Montana Western Railway Company Abandonment, to which plaintiff was not a party. The second, designated Docket 30325, is entitled, Valier Community Club v. Montana Western Ry. Co. and Great No. Ry. By the first proceeding applicant sought a certificate of convenience and necessity, authorizing abandonment of its entire line between Valier, Montana, and its junction with the line of the Great Northern Railway Company. The second is a proceeding commenced by a voluntary organi-

zation of citizens of Valier against the carriers named, seeking the establishment of reasonable joint rates on grain in carloads from points on the Montana Western to points on the Great Northern, and the establishment of reasonable divisions of such rates.

In its report of July 31, 1950,<sup>15</sup> the Commission sets forth an accurate and full recital of the facts. It appears therefrom that Montana Western was incorporated under the laws of Montana in 1909, and extends from Valier to the junction with the Great Northern at Conrad, a distance of about twenty miles, as compared to 1030 miles from Conrad to Minneapolis via Great Northern. Valier is a hamlet of about 800 inhabitants. There are two non-agency stations on the line at Manson and Williams, of a population of ten and eleven respectively. The approximate area served by Montana Western is about 553 square miles, comprised of a total population of about 2,000. Its bonded indebtedness is \$165,000, all of which is owned by the Great Northern, and bears interest at six percent from January 1, 1912. The principal and interest remain wholly unpaid. It also owes the Great Northern, as of March 31, 1949, \$195,829 for materials and supplies, repairs, labor and money advanced to cover operating expenses. The total indebtedness of the Montana Western to the Great Northern, at the time of the first hearing in July, 1949, was \$737,604. Since 1924, the Montana Western's operating losses have been paid by advances from the Great Northern. Its line was not built according to accepted standards of economical maintenance. Untreated cross ties were laid on the ground with practically no ballast. As a result, drainage is almost nil on the greater portion of the line, and the cross ties deteriorate rapidly. Its rolling stock consists of one gasoline-electric

<sup>15</sup> 275 I.C.C. 512.



locomotive, one steam locomotive, with three sets of drivers, and one flatcar. There are motortruck and motorbus services on Federal Highway No. 91 running north and south through Conrad. An oil-surfaced highway runs between Valier and Highway No. 91. The highway distance between Conrad and Valier is 23 miles. A graveled highway runs southwest from Valier, connecting with U.S. Highway No. 89. Most of the grain moves to Minneapolis and Duluth, Minnesota. Most of the farmers in the area served by the Montana Western ship their cattle by truck either to Great Falls, Montana, or to Shelby. The area served by the line produces from 800,000 to 1,000,000 bushels of grain annually. There is a bulk oil storage plant at Williams, but most of the oil stored in this plant is now brought in by motortruck. The key grade is three percent, and is against the outbound movement, and limits the capacity of the steam locomotive to eight carloads and the gasoline-electric locomotive to two carloads of grain. The rates on grain from points on the line have always been proportional rates based on Conrad and resulted from an agreement made in 1924 after an investigation by the Board of Railroad Commissioners of the State of Montana. Only about five percent of the carload tonnage carried by the Montana Western moves on joint through rates with the Great Northern. The foregoing will suffice for the purpose of determining the issues raised in the present case.

The Commission makes no particular point with reference to the reasonableness of the existing rates, and it makes no finding that such rates were unreasonable.<sup>16</sup>

<sup>16</sup> In *Beaumont, S. L. & W. Ry. v. United States*, 282 U.S. 74, at page 82, the Court, citing cases, says:

"The Commission may not change an existing division unless it finds that division unjust or unreasonable."

See also *B. & O. R. Co. v. United States*, 298 U.S. 349, 357.

That the Commission is authorized to act on its own initiative in proper cases,<sup>17</sup> and that appropriate probative effect may be given to rate comparisons,<sup>18</sup> may be taken for granted, but it seems obvious that the twenty miles of dilapidated trackage and equipment used by the insolvent Montana Western (constituting 1.9 percent of the 1050-mile joint haul to Minneapolis) is withering on the vine of its initial usefulness, and in the face of progress in and adequacy of transportation by motor vehicle over a system of public highways now serving the area.<sup>19</sup> The record of the instant case makes manifest that, except for liberal transfusions of financial aid during the past twenty-five years by the Great Northern, the Montana Western would long since have been dead on its wheels.

Resolving every presumption in favor and support of the order of the Commission, we cannot avoid concluding that prescribing joint through rates on the same level as existing lawful combinations, but with divisions which are unduly favorable to the Montana Western and clearly unfair to the Great Northern, is but a means to the end of assisting Montana Western to meet obvious

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<sup>17</sup> Title 49, United States Code, secs. 13(2), 15(1), (3), (6).

<sup>18</sup> *Louisville & Nashville R. R. Co. v. United States*, 238 U.S. 1, 13; *United States v. Northern Pac. Ry. Co.*, 288 U.S. 490, 500; *Youngstown Sheet & Tube Co. v. U. S.*, 295 U.S. 476, 480.

<sup>19</sup> The record discloses that the area is served by a natural gas pipeline, thus depriving Montana Western of the equivalent coal tonnage haul. Oil and cattle are shipped by truck and mixed train passenger service must compete with the modern automobile.

financial needs. This is expressly prohibited by law.<sup>20</sup>

That Montana Western is insolvent and is in dire need of financial aid if it is to continue to operate goes without saying. But the record affords no basis for the defendant and interverers forcing the Great Northern to finance this ailing railroad through a discriminatory division of joint rates. If those served by Montana Western feel the need of revitalizing it financially there is no legal barrier to their furnishing the necessary funds for its further operation. We are of the opinion that the Great Northern cannot be compelled, directly or indirectly, to assume that burden.

We think that the order of the Commission is not sustained by the evidence and is contrary to law; and that the relief prayed for by petitioner should be granted.

Petitioner may present findings of fact and conclusions of law consistent with this opinion.

Dated this 16th day of March, 1951.

JOHN B. SANBORN,  
*United States Circuit Judge.*

MATTHEW M. JOYCE,  
*United States District Judge.*

DENNIS F. DONOVAN,  
*United States District Judge.*

<sup>20</sup> Title 49, United States Code, sec. 15(4), contains the following prohibition:

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

United States v. Mo. Pac. R. Co., 278 U.S. 269; United States v. Chicago, Milwaukee, St. Paul & Pac. R. Co., et al., 294 U.S. 499, 506.